78-1899



IN THE SUPREME COURT OF UNITED STATES

# APPENDIX TO PETITIONERS" PETITION FOR WRIT OF CERTIORARI AND LEAVE TO FILE (PRELIMINARY)

PETITIONERS v. INDIAN HEAD, INC.

RICHARD F. DE MOSS AND
WILLIAM J. BARRENTINE
JOINT TENANTS IN COMMON
OR SURVIVOR

## CONTENTS

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RICHARD F. DEMOSS and
WILLIAM J. BARRENTINE,
Joint Tenants in Common or Survivor,

Appellants, v. Indian Head, Inc, et. al.,
Appellees.
No. 275, 1977
Submitted: November 27, 1978
Decided : December 18, 1978

Before HERRMANN, DUFFY and HORSEY,

Appeal from the Superior Court, Denying Jury trial on Fraud and Deceit, and denial of plaintiff rights of obtaining Discoveries, also, for allowing a non-jurisdictional opinion of chancery to stand.

Opinion by Horsey

This 18th day of December, 1978,

Upon consideration of the briefs submitted by the parties and oral argument before the Court on November 27, 1978, it appears to the Court that:

( 1 ) This action is before this Court on appeal by plaintiffs from an order of the Superior Court dated September 8, 1977, dismission the Complaint on the ground that the subject matter of this action is barred by principles of res judicata and collateral estoppel and by the statute of limitations, 10 Del. C. §8106.

( 2 ) The subject matter is the same as that in two prior actions brought by plaintiffs against the same defendant in the Court of Chancery: The Base Co., Inc., et al. v. Indian Head, Inc., Civiil Action No. 4175, in which DeMoss was a plaintiff hearafter referred to as the "1973 suit"), and Barrentine v. Indian Head, Inc., Civil Action No. 4461, in which DeMoss participated through the filing of a "Bill for Review", (hereafter referred to as the "1974 suit").

( 3 ) In the 1973 suit, the Court of Chancery, by opinion and order dated November 26, 1973, held for defendent, Indian Head, finding that no contract came into being or existed between Base and Indian Head for which relief could be granted. That decision was affirmed by this Court by order dated October 18, 1974. See 344 A.2d 384 (1974). In the 1974 suit, the Court of Chancery dismissed the action brought by Barrentine by opinion and order dated May 21, 1976; the Court ruled that Barrentine's suit was barred by principles of collateral estoppel by reason the 1973 suit and its dismissal. However in the



Barrentine action, papers were filed on behalf of DeMoss titled, "Bill for Review", claiming that Indian Head had committed fraud in connection with socalled advance ratification of corporate contracts . . . ", even if they were taken to be true. Plaintiff appealed and this Court again affirmed by order dated August 20, 1976. See 365 A.2d 136 (1976).

( 4 ) This action (hereafter referred to as the "1976 suit") was brought in the Superior Court by both DeMoss and Barrentine against the same defendant, Indian Head. The Court found this action to be based on the same transaction and subject matter as the two prior actions. A claim of fraud was again made, namely that Indian Head had committed fraud on the Court of Chancery in contending that the alleged contract required approval of its Board of Directors when the Board had delegated its authority to contract so as not to require Director approval. In its opinion, the Superior Court found ( 1 ) that the question of fraud had been raised and disposed of in the 1974 suit in the "Bill for Review"; ( 2 ) that the alleged fraud, " . . . even if proven, . . . would not constitute a course of conduct [by] defendant which would amount to fraud"; and ( 3 ) that there was no evidence of concealment or fraudulent conduct by defendent in connection with the negotiations with plaintiffs or third parties concerning the proposed sale of assets.

( 5 ) In summary, the Court found ( 1 ) that any claim by DeMoss was barred by principles of res judicata; ( 2 ) that any claim by Barrentine was barred by principles of collateral estoppel, there being privity of interest between thenselves and Base; and ( 3 ) that apart from the foregoing, the suit was barred by the limitation of 10 Del. C. §8106, all causes of action having accrued more than three years before the filing of the suit and not tolled,

( 6 ) Plaintiffs' remaining claims argued on appeal should be dismissed under former Rule 5 ( 7 ) as not timely raised and argued in the Court below

( 7 ) There is no reversible error.

NOW, THEREFORE, IT IS ORDERED That the judgment of the Superior Court be and it is hereby

AFFIRMED.

BY THE COURT:

( Signed ) Homer R. Horsey,
Justice



IN THE SUPREME COURT OF THE STATE OF DELAWARE .

DEMOSS vs. INDIAN HEAD

No. 275, 1977
C.A. 868, 1976

DENIAL OF REARGUMENT

1979, January 12.

Received and filed memo dated January 12, 1979 by Justice Horsey, denying motion for re-argument.

(Signed) R. Townsend

OPINION OF SUPERIOR COURT OF THE STATE OF DELAWARE

RE: DeMoss, et al v. Indian Head Inc., et al 868 Civil Action, 1976, Document Nos.

Submitted: July 25, 1977

Decided : September 8, 1977

The purpose of this letter is to give the decision of the Court on the plaintiffs' motion to remove the attorney of record and the defendant's motion to dismiss the plaintiffs' complaint.

The original action in this continuing litigation was The Base Company, Inc., et al v. Indian Head, Inc., Chancery, C.A. 4175, aff'd without an opinion Del. Supr. 344 A.2d 384 ( October 18, 1974 ). In this action, the plaintiffs Base and DeMoss sought specific performance of an alleged purchase and sale of corporate assets between the plaintiffs and the defendant.

On March 15, 1974, plaintiff Barrentine brought suit against the defendant in the Court of Chancery seeking specific performance and damages resulting fromthe defendant's failure to perform the alleged Base and Indian Head contract. Barrentine v. Indian Head, Inc., Chancery, C.A. 4461, aff'd without an opinion Del. Supr. 365 A.2d 136 ( 1976 ). Chancellor



Marvel ruled that the plaintiff was barred by the principles of collateral estoppel in light of the disposition of the earlier litigation.

During the Barrentine suit, plaintiff DeMoss filed what he termed a "Bill for Review" of C. A. No. 4175. The plaintiff alleged therein that Indian Head commonly dispensed with formal Board approval of corporate contracts by delegating such authority in advance. The Court held that the plaintiff could have advanced and litigated this theory at the trial level and his failure to do so was not excusable neglect or attributable to newly discovered evidence. The "Bill for Review," treated as a motion under Rule 60 ( c ), ( 1 ), ( 2 ) and ( 3 ), was dismissed.

The present action was initiated on July 21, 1976, by the plaintiffs Barrentine and DeMoss appearing pro se. This action suffered immediately from plaintiffs' lack of knowledge of the procedural and substantive law. The plaintiffs' misunderstood the requirements of service of process. Service was directed to the defendantin care of its attorney, Walter L. Pepperman, II, Esquire, at the latter's Wilmington office. Mr. Pepperman refused to accept service alleging that he was not authorized under the provisions of Rule 4 (f) (1) (III). It is clear that he was not, in fact, an authorized agent to receive service.

Several attempts to serve the complaint upon Mr. Pepperman met with his continuing refusal to accept service.

On September 25, 1976, the plaintiffs directed the entry of a default judgment in the amount of $1,503,504.76 against the defendant for failure to answer the complaint even though service had not been had. Be error, judgment was entered. Mr. Pepperman, by letter of September 29, 1976, apparently unaware that a default judgment had been entered, advised plaintiff DeMoss that Indian Head, Inc. had not been served with process and, therefore, he had no authority to communicate with the plaintiff on behalf of Indian Head. This letter is the basis of plaintiffs' motion to remove defendant's attorney.

Thereafter, on October 15, 1976, the defendant, through its attorney Walter L. Pepperman, moved to vacate the default judgment on the ground that the defendant had never been served with process. Judge George R. Wright of the Superior Court entered an order granting the motion.

Subsequently, on December 28, 1976, another summons was issued properly addressed to the defendant's registered agent, Corporation Trust Company, 100 West 10th Street, Room 1210, Wilmington, DE 19801. This summons was finally served on January 6, 1977.



On January 13, 1977, plaintiffs filed, in this Court, a motion to remove defendant's attorney. Shortly thereafter, on January 26, 1977, defendant timely served and filed a motion to dismiss the complaint under Rule 12 ( b ) ( 6 ) on the ground that plaintiffs' claim was barred by the statute of limitations and by principles of res judicata and collateral estoppel.

Interrogatories served upon the defendant were stayed by my order of February 24, 1976, pending resolution of the then pending motions.

* * * *

The Court finds that the motion to remove the defendant's attorney is without merit and that motion is hereby denied.

The crux of the matter is the plaintiffs' misunderstanding of the procedure involved. Service of process upon a domestic corporation comes within the provisions of Rule 4 ( f ) ( 1 ) ( III ) and is accomplished by delivering the papers " . . . to an officer, a managing or general agent or to any other agent authorized by law to receive service of process . . . " The facts clearly indicate that Mr. Pepperman was not authorized was not authorized to accept service of process and that attempts to serve him were of no effect.

The letter of September 29, 1976, from Walter Pepperman to Richard DeMoss, upon which the plaintiffs so heavily rely, states in its pertinent part, "Indian Head, Inc., has not been served with process in any such action therefore, I have no authority further to communicate with you on behalf of Indian Head, Inc." This sentence is not ambiguous and merely states that since process was not served on Indian Head that he, Walter Pepperman, had no authority for further communication with the plaintiffs on that matter. The plaintiffs' attempts to take the second half of the sentence and to construe it out of context are misdirected. It is evident that Mr. Pepperman was not denying that he was the defendant's attorney. A review of the entire record reveals absolutely no grounds to support the motion to remove the defendant's attorney.

* * * *

Defendant's motion to dismiss the plaintiffs' complaint is granted.

The gravemen of the plaintiffs' complain t is that the defendant breached the alleged Base and Indian Head contract and that the defendant committed fraud upon the Court of Chancery by stating that the alleged contract required board of director approval. These are the matters which were raised, and disposed of, in the earlier litigation between the parties.



In the matter of The Base Co., Inc. et al v. Indian Head, Inc., Chancery C. A. No. 4175, (unreported decision dated November 26, 1973) Chancellor Marvel held that there was no contract between Base and Indian Head. " . . . I conclude that a contract between plaintiffs and Indian Head for the sale of the Wilmington Finishing Division of Joseph Bancroft & Sons Company does not exist and the fact that plaintiffs undoubtedly incurred expenses looking towards the execution of an enforceable contract does not alter the fact that negotiations came to naught and a contract did not come into being." Since the Court of Chancery has found that no contract exists and that decision has been affirmed by the Supreme Court, the issue is no longer open to question. The matter has already been clearly resolved adversely to the plaintiffs Base and DeMoss.

Subsequent thereto, plaintiff Barrentine Brought an action against the same defendant based on the same alleged contract. Barrentine v. Indian Head, Chancery, C.A. 4461, aff'd Del. Supr. 365 A.2d 136 ( 1976 ). Chancellor Marvel, applying the principles ofcollateral estoppel to the plaintiffs' complaint, held that it was barred by the disposition of the earlier litigation brought on behalf of Base and DeMoss against Indian Head in Chancery C.A. 4175 (unreported decision dated May 21, 1976).

In the aforementioned "Bill for Review", plaintiff DeMoss raised the question of fraud by the defendant on the latter's assertion that Board of Director approval was required for the alleged contract. Chancellor Marvel held (in an unreported decision dated June 10, 1976), and I agree, that such a contention is a matter which could have been directly raised at the trial level. Further, the plaintiffs' allegations, even if proven, would not constitute a course of conduct on the part of the defendant which would amount to fraud. Plaintiffs indiscriminately use the word "fraud" in connection with the defendant actively concealed or attempted to conceal anything concerning prior director approval. Also, there was nothing fraudulent about contemporaneous negotiations with other possible purchasers of the Wilmington Finishing Division.

Accordingly, as to plaintiff DeMoss, the doctrine of res judicata applies to all matters which were raised or might have been raised in the prior litigation. The judgment in the prior suit involving plaintiff DeMoss bars this second suit based on the same cause of action. Foltz v. Pullman, Incorporated, Del. Super. 319 A.2d 38 *1974). As to plaintiff Barrentine, collateral estoppel applies as to the issue which was actually litigated, the existence of the contract.



This precludes further litigation of that issue. Foltz v. Pullman, Incorporated, supra.

* * * *

As a further basis for this decision, I find that the action is barred by the applicable statute of limitations.

It is clear that the statute to be applied is 10 Del. C. §8106 which states in its pertinent part " . . . no action to recover damages caused by an injury unaccompanied with force . . . shall be brought after the expiration of 3 years from the accruing of the cause of such action . . . " The defendant alleges, and I so find, that the last date any injury could have been caused by the defendant's actions was March 27, 1973, the date of the Board of Director's rejection of the proposed contract. Having previously determined that there were no actions by the defendant amount to fraudulent concealment which would be sufficient to toll the statute of limitations, the cause of action accrued no later than March 27, 1973. This action which was commenced on July 21, 1977, is, therefore, barred.

* * * *

The plaintiffs' motion to remove the defendant's attorney is denied. The defendant's motion is to dismiss the complain is granted. IT IS SO ORDERED.

Very truly yours,
Andrew D. Christie

SUPERIOR COURT OF THE STATE OF DELAWARE
DENIAL OF REARGUMENT

RE: DeMoss, et al v. Indian Head Inc.,
et al 868 Civil Action, 1976

I acknowledge receipt of a motion for reargument in the above case which motion was filed September 12, 1977. I also received a short letter from Mr. Barrentine dated September 13, 1977, in connection with the motion and a letter from Mr. Pepperman dated September 19, 1977.

I have reviewed the opinion letter, the motion and the letters in regard to the motion. I find that all the issues have been decided and nothing said in any of the papers gives me any reason to change the decision of the Court. Further argument would not be helpful.

The motion for reargument is denied. IT IS SO ORDED.

Very truly yours,

Andrew D. Cristie



COURT OF CHANCERY OF THE STATE OF DELAWARE

November 26, 1973
Re: The Base Company, Inc. v. Indian Head, Inc.,
C. A. No. 4175

This action seeks specific performance of an alleged contract of purchase and sale of corporate assets entered into between plaintiffs as buyers and the corporate defendant Indian Head, Inc. as seller, which alleged contract, it is claimed, provided for the sale of the Wilmington Finishing Division of the defendant Joseph Bancroft & Sons Company, a wholelyowned subsidiary of the defendant Indian Head, to a corporation to be organized by plaintiffs.

The complaint alleges that in January, 1973, the plaintiff DeMoss entered into negotiations with defendant Indian Head, Inc., looking towards purchase of the Wilmington Finishing Division to a corporation to be organized by plaintiffs and that such negotiations culminated in the making of an enforceable agreement in principle providing for the purchase and sale of the property in issue, said preliminary agreement having been allegedly reached by the parties in interest on March 1, 1973. Said alleged agreement, provided, however, that: "This agreement in principle shall be subject to the approval of the Board of Directors of Indian Head, Inc."

Alternatively, plaintiffs seek damages in excess of $1,000,000, allegedly sustained by them as a result of defendants' alleged breach of contract.

Plaintiffs claim that as of March 1, 1973, Indian Head, Inc. had completed all steps required by it to insure consummation of the proposed sale to plaintiffs of the Wilmington Finishing Division of Bancroft & Sons, and that the only acts thereafter remaining to be performed by either side to this litigation had to do with undertakings on the part of the plaintiff DeMoss, the president of The Base Company, concerned with the financing of the transaction in issue and the formation of a purchasing corporation.

The so-called letter of intent dated March 1, 1973, as well as alleged contemporaneous verbal understandings between the parties, on which plaintiffs rely for the relief sought by them, contemplated a closing date of on or about March 26,1973. Looking towards such contemplated closing, Indian Head, on March 5, 1973, forwarded to plaintiffs a proposed draft form of contract providing for the sale of the Wilmington Finishing Division of Bancraft & Sons to plaintiffs with instructions that a copy of the forwarding letter be executed and returned by March 12. Such draft, which was marked as such, contained some blank spaces and was never executed by Indian Head.



The covering letter which forwarded such draft referred to such enclosure as a "*** proposed form of Purchase Agreement." However, such draft was executed by the plaintiff corporation and was returned to defendant on March 12,. Later that same day Mr. DeMoss was informed by Indian Head that the purchase and sale negotiations concerning the Wilmington Finishing Division were being terminated, and on March 27, one day after the anticipated closing date, the board of directors of Indian Head formally rejected plaintiffs' offer to buy Bancroft & Sons, having been informed by management personnel of the Wilmington Finishing Division that they would not work for the plaintiff DeMoss, telephonic information asto such position having been conveyed to Mr. DeMoss on March 12.

This is the decision of the Court on defendants' motion for summary judgment dismissing the complaint, a motion which is based on the theory that plaintiffs' action must fail because the proposed buyer and seller failed to reach agreement on the terms of an enforceable contract, a condition precedent to a firm contract being, as noted above, its approval by the board of directors of Indian Head. Plaintiffs, on the other hand, contend that a question of fact exists as to whether or not Indian Head's board of directors actually approved the form of contract on

which plaintiffs rely and that this case cannot be properly decided short of trial.

In the case of H and S Manufacturing Company v. Benjamin F. Rich Company, 39 Del. Ch. 380, 164 A.2d 447 it was held that where summary judgment is sought, the moving party has the burden of clearly demonstrating the absence of any genuine factual issue. Compare Warshaw v. Calhoun, 42 Del. Ch. 437, 213 A.2d 539, aff'd Del. Supr. 221 A.2d 487, and Nash v. Connell, 34 Del. Ch. 20, 99 A.2d 242. Accordingly, while a pary moving for summary judgment must normally carry the burden of demonstrating the absence of a material dispute of fact, in a situation in which the opposing party fails to produce any opposing evidence, wuch burden is deemed carried, Berwald v. Mission Development Company, 40 Del. Ch. 509, 185 A.2d 480.

Plaintiffs, in seeking to raise a material factual issue, contend that paragraph 8 (d) *1 of the March 5 draft of agreement, which was prepared by defendants, should be construed to be an offer to sell, which was accepted when the plaintiff DeMoss executed such instrument. A reading of the instrument, however, persuades me to the contrary. Paragraph 8 (d) of the March 5 draft, in my opinion, clearly refers to the future and was to become



effective only after formal approval to the proposed sale had been given by the board of directors of Indian Head. (See par. 8 (c) of same draft which provides that: "The execution and carrying out of this Agreement and compliance with the provisions hereof by Seller will not violate any provision of law.***")

Having found no material facts at odds with the unambiguous written provision of the original letter of intent *2 that a firm contract was not to come into being between the bargaining parties until approval by the board of directors of Indian Head, which not granted, I conclude that a contract between plaintiffs and Indian Head for the sale of the Wilmington Finishing Division of Joseph Bancroft & Sons Company does not exist and the fact that plaintiffs undoubtedly incurred expenses looking towards the execution of an enforceable contract does not alter the fact that negotiations came to naught and a contract did not come into being. Having reached such conclusion, it will be unnecessary to decide whether or not specific performance is an appropriate remedy for the relief sought by plaintiffs.

Defendants' motion for summary judgment of dismissal of the complaint will be granted, and , on notice, an appropriate order may be submitted.

*1

"8 (d) The execution, delivery and performance of this Agreement on the part of Seller has been duly authorized by all necessary corporation action."

*2

"Whether or not a letter of intent may constitute a binding agreement depends upon the intend of the parties as disclosed by the facts and circumstances" Itek Corporation v. Chicago Aerial Industries, Inc. (Del. Supr.) 274 A.2d 141.



IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE BASE COMPANY, INC. a
Delaware corporation, and
RICHARD F. DeMOSS,
Plaintiffs Below, Appellants,

vs.

INDIAN HEAD, INC., a
Delaware corporation, and
JOSEPH BANCROFT AND SONS
COMPANY, a Delaware corporation,
Defendants Below, Appellees.

No. 2, 1974
Submitted: September 25, 1974
Decided : October 18, 1974

AFFIRMING ORDER

AND NOW, to-wit, this 18th day of October, 1974, upon due consideration of the contentions of the parties,

It Appearing to the Court:

( 1 ) That the Court of Chancery granted summary judgment in favor of the defendants, for the reasons set forth in letter opinion dated November 26, 1973; and

( 2 ) That this Court is in agreement with the conclusions and decision set forth in the said letter opinion:; and

( 3 ) That there is no genuine issue as to any material fact, reflected in the record of this case, and that the defendants are entitled to judgment as a matter of law, as was determined by the Chancery Court; and

( 4 ) An opinion in this case would have no precedential value,

NOW, THEREFORE, IT IS ORDERED That the judgment below be and it is hereby

AFFIRMED.

( Signed ) Herman

( Signed ) Duffy

( Signed ) McNeill



Court of Chancery of the
State of Delaware
March 22, 1976
Letter Opinion
Re: The Base Company, et al v. Indian Head,
C.A. Nos. 4175 and 4461

Dear Mr. DeMoss:

I have reviewed the pleading files in the above two cases in connection with your pending motion for review and find that judgment in case No. 4175 was affirmed by the Supreme Court of the State of Delaware in January, 1974, and the case closed.

As far as C. A. No. 4461 is concerned, this case has been assigned to Vice Chancellor Brown and any application you have in the matter should be addressed to him.

Very truly your,

Vice Chancellor
William Marvel

**Court of Chancery of the**
**State of Delaware**
**May 21, 1976**
**Opinion**

**Re: Barrentine v. Indian Head, C. A. 4461,**
**Submitted: April 6, 1976**

Plaintiff seeks an order of this Court directing the specific performance of an employment contract allegedly entered into between him as a prospective employee and The Base Company as his employer to be in March 1973, in reliance on which plaintiff incurred substantial expenses having drastically changed his position because of the expectations flowing from the imminent consummation of such alleged employment contract upon the expected acquisition of assets of Indian Head by The Base Company. Also sought are damages allegedly sustained by plaintiff as a result of not being employed as expected.

Assuming that the type of contract here involved is susceptible of being enforced by a decree of specific performance despirte its being one for personal services, a type of contract this Court is not normally competent to enforce because of its very nature, I am satisfied that the coming into being of the contract plaintiff seeks to have specifically



enforced was dependent on the successful acquisition by The Base Company of assets of the defendant Indian Head, a claim which was litigated to final judgment in C. A. 4175 with results adverse to the contentions made by The Base Company.

In the cited case in this Court, in finding that an auctionable contract between The Base Company and Indian Head had never come into being stated:

> "Looking towards such contemplated closing; Indian Head, on March 5, 1973, forwarded to plaintiffs a proposed draft form of contract providing for the sale of the Wilmington Finishing Division of Bancroft & Sons to plaintiff with instructions that a copy of the forwarding letter be executed and returned by March 12. Such draft, which was marked as such contained some blank spaces and was never executed by Indian Head.
>
> *****
>
> "Having found no material facts at odds with the unambiguous written provision of the original

> letter of intent that a firm contract was not to come into being between the bargaining parties until approval by the board of directors of Indian Head, which was not granted. I conclude that a contract between plaintiffs and Indian Head for the sale of the Wilmington Finishing Division of Joseph Bancroft & Sons Company does not exist and the fact that plaintiffs undoubtedly incurred expenses looking towards the execution of an enforceable contract does not alter the fact that negotiations came to naught and a contract did not come into being."

Applying principles of collateral estoppel to plaintiff's complaint here, I have no doubt but that plaintiff's claim is barred in light of the final disposal of the earlier litigation brought on behalf of The Base Company, against Indian Head in C. A. 4175. Insofar as plaintiff seeks damages sounding in tort, he has an adequate remedy at law.



Defendant's motion to dismiss the complaint herein is hereby granted subject to the provision of 10 Del. C. §1901.

It is SO ORDERED this 21st day of May, 1976.

( Signed ) William Marvel
Vice Chancellor

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM J. BARRENTINE,
Plaintiff Below,
Appellant,

v.

INDIAN HEAD, INC., a Delaware corporation
Defendant Below,
Appellee.

No. 156, 1976
Submitted: July 19, 1976
Decided : August20, 1976
AFFIRMING ORDER

This 20th day of August 1976,

It appears to the Court that:

( 1 ) In this action for specific performance of an employment contract the Court of Chancery granted defendant's motion to idsmiss the complaint;

( 2 ) Pursuant to the provisions of Rule 8 ( 2 ) defendant has moved to affirm the judgment of the Trial Court;



( 3 ) It is manifest on the face of plaintiff's brief that the appeal is without merit because the issue on appeal is clearly controlled by settled Delaware law and the case of Base Company, Inc. v. Indian Head, Inc., Del. Supr., 344 A.2d 384 (1974).

NOW, THEREFORE, IT IS ORDERED That the judgment below be and it is hereby

AFFIRMED.

BY THE COURT:

(Signed) Duffy
Justice

COURT OF CHANCERY OF THE
STATE OF DELAWARE
January 3, 1977
OPINION

Re: Indian Head v. DeMoss, et al., C.A. 5208,
Submitted: November 30, 1976

I have considered plaintiff's motion for injunctive relief against Mr. Barrentine's prosecution of a related suit in the Superior Court of the State of Delaware in and for New Castle County, against Indian Head, Inc. and am of the opinion that such motion shoudl not be granted at the present time inasmuch as the Barrentine action in Superior Court is allegedly based on the law of deceit, while the original Chancery litigation was concerned with an alleged contract between Mr. DeMoss and Indian Head, Inc. in which Mr. Barrentine claimed a beneficial interest.

In short, a court of equity should be hesitant to enjoin a party from prosecuting litigation pending in a sister court under any circumstance and here plaintiff apparently relies on a different theory for recovery than that relied on in this Court and in the Delaware Supreme Court.



However, unless the Superior Court action is stayed or otherwise disposed of in the meantime, Indian Head may renew its motion for injunctive relief against alleged repetitive and harrassing litigation being prosecuted by Mr. Barrentine in Superior Court on or after June 30, 1977.

IT IS SO ORDER this3rd day of January, 1977.

( Signed ) William Marvel,
Chancellor

28 U.S.C.A. 1257

Note 15, Page 156 - "The United States Supreme Court is the final authority as to what constitutes a federal question. Beckman Lumber Co. v. Acme Harvester Co., 1908, 114 S.W. 1087, 215 Mo. 221"

Note 62, Page 182 - "Every question arising under the Federal Constitution may, of properly raised in a state court, come ultimately to the U.S.S.Ct. for decision. Hague v. Committee for Industrial Organization, N.J. 1939, 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423

Note 107, Page 220 - "A decision of a state court disposing of a federal question by following its decision on a former appeal as the law of the case, cannot be regarded as resting on the independent, non federal ground of res judicata. South. R. Co. v. Clift, In. 1922, 43 S. et, 126, 260 U.S. 316, 67 L.Ed. 283"

Note 109, Jury Trial, Page 220 - Local rule applicable.

Note 108, Due Process, Page 220 - "Claimed non-federal ground of Ala. S. Ct. decision barring assoc. from doing business in Alabama based upon asserted failure of aggoc.'s brief on appeal to conform to Ala. Ct. rules was inadequate to have review by U.S.S.Ct. of Const. claims presented by assoc., where assoc. substantially complied with proced. rules both in substance and form."



Note 110, Burden of Proof, Page 220 - "A question of burden of proof may amount to a federal question when intimately involving substantive rights under a federal stahite, Hill v. Smith, Mass. 1923, 43 S. Ct. 219, 2L0 U.S. 592, 67 L.Ed. 419"

Note 194. Full Faith and Credit Clause, Page 241 - Where procedural rules are followed, parament to Del. Statutes and Codes.

Note 403, Denial of Federal Rights, Page 318 - " Supreme Ct. may inquire whether decision of State Ct. denying constitutional protection to rights asserted under local law,though on non federal grounds., rests on fair or substantial basis. Demorest v. City Bank Farmers Trust Co., N.Y., 1944, 64 S.Ct. 384, 321 U.S. 36, 88 L.Ed. 526."

Delaware Code Annotated, Vol. 13, Chancery Court Rules

Rule 3 ( a ) at Page 140 - "Complaint. An action is commenced by filing with the Register in Chancery."

Rule 3 ( b ) Deposit for Cost. Page 140 - "The Register in Chancery will not file any paper or record or docket any proceeding until a deposit for fees and costs has been made with him."

Rule 4 ( a ) Summons; Issuance. Page 143 - "Upon the commencement of an action, the Register in Chancery shall forthwith issue summons and deliver it for service to the sherriff."

Rule 12 ( a ) Defenses and Objections, When and How Presented - When Presented, Page 167 -A defendant shall serve his answer within 20 days after the service."

Note ( 3 ), at 170 - "Whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the court shall dismiss the action."

Rule 59, New Trials, Page 283

( a ) Grounds. "A new trial may be granted to all or any of the parties, and on all or part of the issues for any of the reasons for which rehearing have heretofore been granted in suits at equity. The court may open judgment if one has been entered, take additional testimony, amend or make new factual findings and legal conclusions, and direct the entry of a new judgment. A new trial will not be granted after the filing of an appeal."



Delaware Code Annotated, Vol. 13, Supreme Court Rules

Rule 5, Note ( 3 ) - Questions not previously raised-generally at 26, - "The Supreme Ct. will not permit a litigant to raise in the Supreme Ct. for the first time maffas not argued below, where to do so would be to raise an entirely new theory of the case, but when the argument is merely an additional reason in support of the proposition urged below, there is no acceptable reason why, in the interest of a speedy end to litigation, the argument should not be considered on appeal."

Note 4 - at 27, questions of jurisdiction, legality or public policy - "Ordinarily, appellate court will not consider questions which have not been fairly presented below except when question is one of jurisdiction of subject matter, or when question of public policy is involved. Id."

Rule 7 ( 1 ) Records on Appeal Page 29 - "Appeals in all causes shall be heard on the original papers and exhibits, which shall constitute the record on appeal."

Note ( 4 ) Record Generally, at 32 - Cases in Supreme Court are not heard upon an abstract but upon the original papers sent up from the lower ct. Mahen v. Voss 98 A.2d 499 (1953)."

Note ( 14 ) Questions Considered, at 35 - "The appellate et. can consider nothing that is not continued in the record, and will not pass upon a question not raised by the record. Layton v. Trustees of Poor of Sussex County, 6 Houston 13, 11 Del. 13 (1880)"

Note ( 17 ) Evidence at 35 - "Where the evidence taken was not made part of the record by bill of exceptions in accordance with the statutes and rules, the evidence was not before the S. Ct. on error proceedings. Stidham v. Brooks, Terry 110, 40 Del. 110, 5 A2d 522 (1939)"

Rule 14 Mondate - Special form, (2), at 44 - In any cause in which a special form of mandate, judgment, decree, or process may be required, the Ct. may, upon application of consel filed prior to the time fixed for the issuance of the mandate, on you its own motion, permit caused to be heafd upon the form thereof."